**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF OKLAHOMA**

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| KIMBERLY "SWEET BROWN" WILKINS and SPARKELL ADAMS d/b/a GLOBAL ROCKSTAR MANAGEMENT | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No.: 5:13-cv-00026-HE |
| CITICASTERS CO., THE BOB RIVERS SHOW, BEN KARLSTROM, ITUNES, INC., a subsidiary of APPLE, INC., and JOHN DOES 1-25, | ) | |
| Defendants. | ) | |

**DEFENDANTS CITICASTERS CO. AND THE BOB RIVERS SHOW'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREIN**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendants Citicasters Co. and The Bob Rivers Show (collectively "Defendants") move to dismiss this action for failure to state a claim upon which relief can be granted as authorized by Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## I. INTRODUCTION

1. Plaintiffs Kimberly "Sweet Brown" Wilkins ("Ms. Wilkins") and Global RockStar Management ("Global"), Ms. Wilkins' manager, assert one cause of action in their First Amended Petition ("Amended Petition"). Plaintiffs claim that the four named and identified defendants (Citicasters Co., The Bob Rivers Show, Ben Karlstrom, and iTunes, Inc.), and upwards of 25 unknown or fictitious defendants, have all violated OKLA. STAT. TIT. 12, § 1449 (2011), or what has been referred to as the "right of publicity."

2. In particular, Plaintiffs claim that Defendants Citicasters Co. and The Bob Rivers Show produced or engineered a song and video that contained words spoken by Ms. Wilkins in two interviews. The first interview was to a local Oklahoma City news station reporter when Ms. Wilkins was interviewed at her apartment complex on April 8, 2012. During the interview, Ms. Wilkins recounted her experiences after she realized a building in her apartment complex was on fire. The second claimed interview was by The Bob Rivers Show, although Plaintiffs do not identify any individual with whom Ms. Wilkins spoke.

3. Plaintiffs have alleged that the Defendants played the song on radio stations, and sold the song on a website owned by another named defendant. They make no allegations against Citicasters Co. and The Bob Rivers Show with regard to any use of the claimed video.

## II. PROCEDURAL BACKGROUND

4. On June 21, 2012, Plaintiffs filed suit on a *pro se* basis in the District Court of Oklahoma County, State of Oklahoma, in a case designated as Case No. CJ-2012-3851 (the "Original Pleading").[1] In the Original Pleading, Plaintiffs asserted three causes of action: (1) music plagiarism sampling; (2) fraud; and (3) negligence. *Id.* Plaintiffs pled damages of: $4 million for music plagiarism sampling and the value of performance; $3.5 million for fraud; and, $7.5 million in punitive damages. (Original Pleading, third page).

[1] Although filed in the District Court of Oklahoma County, Plaintiffs named their original pleading as a "Complaint For: .." *See* Doc. # 1-1. For purposes of simplicity, Defendants refer to this pleading herein as the "Original Pleading." The pages of the Original Pleading were not numbered.

5. Defendants filed a Motion to Dismiss and a Motion to Strike the Original Pleading on July 19, 2012, and set the matters for hearing on September 28, 2012. (Doc. #s 1-6, 1-7). For various reasons, Defendants agreed on several occasions to postpone the hearing date on the pending motions. (Doc. #s 1-11, 1-14).

6. Plaintiffs subsequently retained counsel, and their counsel entered an appearance on December 5, 2012. (Doc. # 1-13). Defendants consented to Plaintiffs' request to amend their petition under 12 O.S. §2015(A), and to again postpone the hearing. (Doc. #s 1-2, 1-15).

7. On December 7, 2012, Plaintiffs filed their First Amended Petition (the "Amended Petition"). (Doc. # 1-2). The Amended Petition amended both the named Plaintiffs and named Defendants, and the amendments demonstrated complete diversity sufficient for removal to federal court. *Id*. The Amended Petition also eliminated the previous three claims, and asserted a single new claim, an alleged violation of OKLA. STAT. TIT. 12, § 1449, the "right of publicity" statute. (*Id*., Amended Petition, ¶¶ 14-17).

8. On January 4, 2013, Defendants removed this case to federal court. (Doc. # 1). On January 8, 2013, the Court ordered Defendants to answer or otherwise respond to the Amended Complaint by January 11, 2013. (Doc. # 6).

## III. STATEMENT OF THE CASE

9. Ms. Wilkins was a resident of an Oklahoma City apartment building on or about April 8, 2012, when portions of the apartment complex caught on fire. (Amended Petition, ¶8). On or about April 9, 2012, a local television news station interviewed Ms. Wilkins about her reaction to the fire, and aired its interview of Ms. Wilkins. (*Id.*)

10. The interview of Ms. Wilkins was part of the news station's reporting of the fire at the apartment complex. The narrative portion of the news story that Plaintiffs refer to in their Amended Complaint, was as follows:

**Reporter:** One resident describes her horrifying experience when she first realized the complex was on fire.

**Ms. Wilkins**: Well I woke up to go get me a cold pop. Then I thought somebody was barbequing. I said oh Lord Jesus it's a fire. Then I ran out. I didn't grab no shoes or nothing Jesus. I ran for my life. And then the smoke got me. I got bronchitis; ain't nobody got time for that.

**Reporter:** According to the apartment manager, the fire started in a woman's home who is wheelchair-bound. She was treated for smoke inhalation at a local hospital. There were no other reports of injuries. The Red Cross is helping those families displaced by the fire.[2]

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[2] Plaintiffs alleged in their Original Pleading that the video of this April 8, 2012 interview was uploaded to YouTube by a user known as "Lucas Marr." *See* Original Pleading ¶ 3 and Exhibit A thereto.

It is not clear that Plaintiffs' referenced link is still available. Defendants do not believe there is any dispute between the parties that the interview by the television news station that was broadcast on April 8, 2012 is available online at the following link to the News Channel 4 webpage: http://kfor.com/2012/04/08/okc-apartment-complex-catches-fire-5-units-damaged/. There is no dispute that the News Channel 4 in Oklahoma City is the television station that conducted the April 8, 2012 interview with Ms. Wilkins, and that broadcasted it later that day. Thus, to the extent that Plaintiffs' link no longer brings up the April 8, 2012 broadcasted interview, the same interview, at the link above, is incorporated by reference herein.

Defendants respectfully request that the court take judicial notice of this interview, which, as above, is referred to by Plaintiffs in their Original Pleading as an exhibit.

To the extent that the interview may be considered extrinsic to Plaintiffs' pleading, a court can consider extrinsic materials without converting a motion to dismiss to a motion for summary judgment. *See Rivera v. Centro Medico de Turabo, Inc*., 575 F.3d 10, 15 (1st Cir. 2009); *Little Gem Life Sci., LLC v. Orphan Med., Inc.*, 537 F.3d 913, 196 (8th Cir. 2008) (court could consider public records without converting motion under FRCP 12(d)

11. Plaintiffs contend that on or about April 9, 2012, the "defendant The Bob Rivers Show" called Ms. Wilkins and interviewed her, asking her general questions relating to the apartment fire. Ms. Wilkins answered the questions. (Amended Petition, ¶9).

12. Plaintiffs claim that on or about that same day, Citicasters Co. and The Bob Rivers Show engineered or produced both a song and a video titled "I Got Bronchitis." (Amended Petition, ¶11). Plaintiffs assert that the song and video contained Ms. Wilkins' voice, and also the words that she had used in her interviews with the television news station and The Bob Rivers Show on April 8 and 9, 2012. (*Id.)* Plaintiffs specifically claim that the song and video contained the following phrases used by Ms. Wilkins, all of which were recorded and broadcast by the news station as part of its story about the apartment fire:

a. "Ain't Nobody Got time for That;"

b. "Cold Pop;"

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when records were background facts, did not contradict the complaint, and were not critical to the outcome of the motion.

Under Federal Rule of Evidence 201(b), the Court can take judicial notice of any fact that is "not subject to reasonable dispute in that it is… capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Under the doctrine of incorporation by reference, the Court may consider on a Rule 12(b)(6) motion not only documents attached to the complaint, but also documents whose contents are alleged in the complaint, provided the complaint "necessarily relies" on the documents or contents thereof, the document's authenticity is uncontested, and the document's relevance is uncontested. *See, Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

Here, as referred to above, Plaintiffs' Amended Petition relies on the April 8, 2012 interview by the local television station.

c. "Ran for my Life;"

d. "Thought somebody was Bar-b-Que'n;" and

e. "Oh, Lord Jesus, it's a FIRE."

(*Id*.)

13. Plaintiffs claim that on or about April 10, 2012, Citicasters Co. and The Bob Rivers Show began selling the "I Got Bronchitis" song on an iTunes website, owned by another named defendant. (Amended Petition, ¶12). Plaintiffs make no claims about any use of the alleged video by the Defendants.

14. Global asserts it is Ms. Wilkins' manager, and contends it is contractually entitled to revenue related to the use, sale, or licensing of Ms. Wilkins' name, likeness, voice, statements, and photographs. (Amended Petition, ¶14).

15. Based on these bare allegations, Plaintiffs seek damages for lost profits, emotional distress, gross revenues earned by all defendants less deductible expenses, punitive damages, and attorneys' fees. (Amended Petition, ¶¶ 16, 17).

## IV. THE "RIGHT OF PUBLICITY" STATUTE

16. To prove a violation of OKLA. STAT. TIT. 12, § 1449 (2011), Plaintiffs must establish that Defendants knowingly used Plaintiffs' "name, voice, signature, photograph, or likeness . . . for the purpose of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person's prior consent…" 12 O.S. § 1449(A) (2011). Consent is not required when a person's name, voice, signature, photograph, or likeness is used "in connection with any news, public affairs, or sports broadcast or account, or any political campaign." 12 O.S. §1449(D) (2011). Moreover,

there is no recovery if a person is not "readily identifiable," and the entire statute is inapplicable to owners or employees of any medium used for advertising, including "radio and television networks and stations," unless such owners or employees had knowledge of any pertinent unauthorized use. 12 O.S. §1449(B), (E).[3]

17. Defendants have found few opinions interpreting or applying this statute, and found no Oklahoma legal authority relating to factual allegations similar to those claimed in this lawsuit.[4]

## V. PLAINTIFFS FAIL TO STATE A CLAIM UNDER FED.R.CIV. 12(B)(6).

18. Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a claim when a party fails "to state a claim upon which relief can be granted." When considering a Rule 12(b)(6) motion, all well-pleaded factual allegations in the complaint are accepted as true and those allegations, and any reasonable inferences that might be drawn from them, are construed in the light most favorable to the nonmoving party. *Peterson v. Grishman*, 594 F.3d 723, 727 (10th Cir. 2010).

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[3] Although the "readily identifiable" language of the statute is used in connection with the subpart of the statute where the term "photograph" is defined, Defendants would argue that the entirety of the cause of action, the "right of publicity," makes it implicit that the complainant must be "readily identifiable" before any recovery is permitted.

[4] The Tenth Circuit case *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), is likely the leading authority interpreting the statute. In that case, the Tenth Circuit examined issues of the First Amendment and rights of publicity with regard to baseball trading cards that parodied baseball players. The court held that applying 12 O.S. §1449 to the parody trading cards presented "a classic case of overprotection," and found that the right of publicity was not compelling enough to allow recovery given that the cards were "an important form of entertainment and social commentary that deserve First Amendment protection." *Id*., at 976.

19. The pleading standard under Fed. R. Civ. P. 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The question is whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). If plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed[.]" *Twombly*, 127 S. Ct. at 1974. ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .")

20. Under the plausibility standard of *Twombly* and *Iqbal*, "mere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555). "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Id*. Further, "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original); see also, *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008).

21. In *Iqbal*, the Court made this "plausibility standard" expressly applicable to all claims subject to Fed. R. Civ. P. 8. *Iqbal*, 129 S. Ct. at 1951 (holding that bare assertions relating to such elements as an individual's knowledge, willfulness, agreement or instrumental role in alleged conduct, without supporting factual allegations, are conclusory and "amount to nothing more than a formulaic recitation of the elements of a . . . claim"). *Iqbal* makes clear that conclusory statements are not entitled to a presumption of veracity and that courts should not "credit a complaint's conclusory statements without reference to its factual context." *Id*. at 1954.

22. The Western District of Oklahoma has on numerous occasions dismissed claims that failed to meet the plausibility standard. *See, e.g., Childs v. Miller, et al.*, No. 10-cv-0439 (W.D. Okla. Aug. 29, 2011) (dismissing claims where plaintiff "simply label[ed] a defendant's actions as improper," finding such conclusory statements to be "essentially legal conclusions"); *Liechti v. Transcanada Keystone Pipeline, G.P., LLC*, 2011 WL 1990491 (W.D. Okla. May 20, 2011) (dismissing claims where legal conclusions were couched as factual allegations, and where conclusory allegations suggested that some but not all of the defendants may have owed a duty, finding such allegations were "speculative generalities" and "[did] not state a basis for a claim") . As discussed below, Plaintiffs' claims are bereft of sufficient factual allegations to create any plausible inference of wrongdoing against Defendants Citicasters Co. and The Bob Rivers Show, and their claims should be dismissed for that reason alone.

23. Like the allegations in *Twombly*, Plaintiffs' Amended Complaint contains "naked assertions" of wrongful acts without the facts to support them. *Twombly*, 127 S.Ct. at

1966. For example, the plaintiffs in *Twombly* based their claims of conspiracy on allegations of "the absence of any meaningful competition" in the market and on "the parallel course of conduct that each engaged in to prevent competition," rather than on factual allegations suggesting an actual agreement. *Id.*, at 1962. Here, Plaintiffs describe their claims in even a more conclusory fashion, stating simply that "Defendants' actions are a continuing violation of 12 O.S. § 1449, the Oklahoma "Unauthorized use of Another Persons' Right of Publicity Statute." (Amended Petition, ¶15.) Plaintiffs fail to identify all specific "actions," and fail to identify which defendant is purported to have committed which of the unidentified actions. In addition, the Amended Petition contains no factual allegations of a temporal nature, making it impossible to respond to the legal conclusion that the unspecified acts by the unspecified defendants compose a "continuing violation."

24. Plaintiffs' global assertions of liability provide no factual claims at all supporting any basis for suing a radio *show*, including naming it as an individual defendant. Moreover, Plaintiffs simply lump in Citicasters Co. as part of their conclusory allegations against the "Clear Channel Defendants," never providing a single specific factual allegation about any act by Citicasters Co. that would give rise to any liability. In particular, Plaintiffs make no allegations related to the required element of a "knowing" action by any specific person, and, as referenced above, do not explain the legal grounds under which a radio show can be held liable for a "knowing" act. Similarly, Plaintiffs' "formulaic recitation" that "at no time" did Ms. Wilkins consent or agree to any use of her "name, likeness, voice, statements, or photograph" is almost by definition

inconsistent with the plausibility standard of *Twombly* and *Iqbal*. (*See* Amended Petition, ¶10).

25. There are no factual allegations about engineering or producing of a song or video, other than it was done. While Plaintiffs allege that the song contained "catch phrases" used by Ms. Wilkins in interviews from April 8 and 9, there are no allegations that any phrase in the song was used by Ms. Wilkins from her April 9 interview with The Bob Rivers Show that was not already broadcast by the local television news station on April 8. Ms. Wilkins plainly consented to that interview and its broadcast (as she did to "answering general questions" when she accepted a call from someone connected with The Bob Rivers Show and voluntarily gave that interview.) The Amended Petition contains no factual allegations about the lyrics to the song complained of, other than they were her words in her voice.

26. Plaintiffs also fail to provide any factual details supporting their references to the "syndicated radio shows" or "local" radio shows where the song was played, or how playing a song could constitute any grounds for recovery under the state statute. Plaintiffs' allegations that there was a use of Ms. Wilkins' name, likeness, voice, statements, and/or photographs in connection with the commercial sale of products, songs, video production, merchandise, goods, advertisements, or solicitation for merchandise, goods or services without Ms. Wilkins' consent (i.e., the elements required to establish a violation of 12 O.S. § 1449), are limited to the unidentified "John Does 1-25" defendants, and are not directed to either Citicasters Co. or The Bob Rivers Show. (*See* Amended Petition, ¶13).

27. Plaintiffs make no allegation that Ms. Wilkins is or was a celebrity, and the television broadcast of its interview with Ms. Wilkins similarly does not provide any facts that would provide notice to Defendants of Global's standing to bring suit based on a statute that is plainly personal in nature. The Amended Petition contains no facts that Ms. Wilkins holds some commercially valuable talent or characteristic, or any other allegations that would explain Global's involvement in this litigation. There are no factual assertions that would explain in any regard how Citicasters Co. or The Bob Rivers Show could have owed Global any duty. The pleading is silent with respect to the nature of any managerial contract between the Plaintiffs, when any understanding or agreement came into effect, or how any contract would be implicated by playing a song created by others on a radio station. There are insufficient factual allegations about the sale on iTunes of the song, how that would result in the generation of revenues, or to whom any revenues would be paid or how expenses would be allocated, or generally the nature of how any commercial benefit was received and by whom.

28. To that end, Plaintiffs never assert how they were damaged, but merely claim that they seek actual damages, including for "lost profits" and emotional distress. The pleading contains no factual allegations that would give rise to a "lost profits" damages recovery, nor does it contain any explanation supporting damages for emotional distress.

29. Plaintiffs' conclusory allegations and sparse narrative as to the actual events fail to adequately provide notice to each of the Defendants of their supposed individual actions that would purportedly give rise to any violation of 12 O.S. § 1449, much less to what Plaintiffs contend is a "continuing" violation of the statute.

30. In short, Plaintiffs' allegations against Citicasters Co. and The Bob Rivers Show rest and depend upon mere legal conclusions rather than factual allegations. *Twombly* holds that when a complaint contains such naked allegations, "without some further factual enhancement it stops short of the line between possibility and plausibility of entitle[ment] to relief." *Twombly*, 127 S. Ct. at 1966 (quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999).

31. The Court is not bound to accept naked conclusions as true in evaluating the sufficiency of the Amended Petition under Rule 8. *Iqbal*, 129 S.Ct. at 1950. The "nub" of the Amended Petition—which is the well-pleaded, non-conclusory factual allegations—is similar to the complaints in *Twombly* and *Iqbal* because it rests on impermissibly conclusory allegations rather than on concrete factual assertions, and thus does not even plausibly suggest wrongful action by either Citicasters Co. or The Bob Rivers Show. *Twombly*, 127 S.Ct. at 1971. This pleading is legally insufficient to entitle Plaintiffs to relief, and the Amended Petition should be dismissed.

WHEREFORE, Citicasters Co. and The Bob Rivers Show pray for judgment in their favor and against Plaintiffs, pray that this Court dismiss Plaintiffs' Amended Petition for failure to state a claim upon which relief can be granted, pray that Plaintiffs take nothing by way of their claims against Citicasters Co. and The Bob Rivers Show, and that Citicasters Co. and The Bob Rivers Show be awarded their costs herein, and such other and further relief as the court deems just and proper.

Respectfully submitted,

HAYNES AND BOONE, L.L.P.

Dated: January 11, 2013

/s/ *Lisa Schumacher Barkley*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of January, 2013 I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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